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Nos. 85-5023

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1985

PATRICK GENE POLAND
and MICHAEL KENT POLAND,

Petitioners,

v.

THE STATE OF ARIZONA,

Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITIONER'S BRIEF ON THE MERITS

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*MARC E. HAMMOND
PERRY, HAMMOND, DRUTZ
& MUSGROVE
P. O. Box 2720
Prescott, Arizona 86302
Attorney for Petitioner
Patrick Gene Poland

*H. K. WILHELMSEN
P. O. Box 2321
Prescott, Arizona 86302
Attorney for Petitioner
Michael Kent Poland

ROBERT K. CORBIN
Attorney General of the
State of Arizona
WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

*GERALD R. GRANT
Assistant Attorney General
Department of Law
1275 W. Washington 1st Fl.
Phoenix, Arizona 85007

*Counsel of Record

17pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	(i)
TABLE OF AUTHORITIES	(ii)
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
Bullington v. Missouri, 451 U.S., 430, (1981).	5, 6, 8, 9, 10, 12
Burks v. United States, 437 U.S. 1 (1978).	5, 6, 8, 9, 11
Carter v. State, 676 S.W.2d 353 (Tx.Cr.Ap. 1984).	8
Ex Parte Charles Bullard, 679 S.W.2d 12 (Tx.Cr.Ap. 1984).	8
French v. Estelle, 692 F.2d 1015, (5th Cir. 1982).	8
Godfrey v. Francis, 613 F.Supp. 747, (D.Ct. 1985).	8
Green v. United States, 355 U.S. 184 (1957).	5
Justices of Boston Municipal Court v. Lydon, ____ U.S. ____, 104 S.Ct. 1805, L.Ed.2d 311, 333 (1984).	9
North Carolina v. Pearce, 395 U.S. 711 (1969).	5
Rumsey v. Arizona, ____ U.S. ____, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).	5, 6, 10, 11
State v. Berry, 133 Ariz. 264, 266, P.2d 1246 (App. 1982).	12
State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980).	3, 4, 7
State v. Good, 9 Ariz.App. 388, 452 P.2d 715, (1969).	12
State v. Hamilton, 356 N.W.2d 169, 173 (Wis. 1984).	8
State v. Lujan, 124 Ariz. 365, 604 P.2d 629, 637 (1979).	7
State v. Madsen, 125 Ariz. 246, 609 P.2d 1046, 1053 (1980).	7
State v. Poland, 132 Ariz. 269, 698 P.2d 784 800-801 (1982).	4, 7
State v. Poland, 144 Ariz. 388, 698 P.2d 183, 198-200 (1985).	4, 7
State v. Poland, 645 P.2d 239 (1982).	6
State v. Rumsey, 665 P.2d 48, 55 (1983).	11
State v. Tyree, 109 Ariz. 258, 508 P.2d 335, 336 (1973).	11
Stroud v. United States, 251 US. 16 (1919).	5

TABLE OF CONTENTS (CONTINUED)

Tibbs v. Florida, 457 U.S. 31, 72 L.Ed.2d 652, 653 (1982). 9

United States v Ball, 163 U.S. 662. 5

United States v. Bibbero, 749 F.2d 581, (9th Cir. 1984). 9

Young v. Kemp, 760 F.2d 1097 (1985). 8

STATUTES

Ariz. Rev. Stat. Ann. Sect. 13-454. 3

A.R.S. 13-4032(4). 3

A.R.S. 13-454(E)(5). 3

A.R.S. ANN SECT. 13-4032(4). 3

QUESTION PRESENTED

1. WHETHER THE DOUBLE JEOPARDY CLAUSE BARS A SECOND DEATH SENTENCE AFTER A REVIEWING COURT HAS DETERMINED THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE FIRST DEATH SENTENCE?

STATEMENT OF THE CASE

Petitioner Patrick Gene Poland was convicted of two counts of first degree murder by an Arizona jury. The trial judge then conducted a separate sentencing hearing to determine whether the death sentence should be imposed pursuant to Ariz. Rev. Stat. Ann. Sect. 13-454 which sets forth the procedure for considering aggravating and mitigating circumstances. The court found only one statutory aggravating circumstance, i.e., that the murders were committed in an "especially heinous, cruel or depraved manner" pursuant to A.R.S. 13-454(E)(6). The court considered each of the other statutory aggravating factors and found none were present. Special Verdict, April 9, 1980, Joint App. pp 12ff.[1] The court construed A.R.S. 13-454(E)(5), that the "defendant committed the offense in expectation of the receipt of anything of pecuniary value," as being limited to contract killings. The court found two mitigating circumstances, "reputation for good character" and "close family ties", but concluded they were not sufficiently substantial to call for leniency. Poland was sentenced to death.

Petitioner appealed both the judgment and sentence to the Supreme Court of Arizona, arguing inter alia the insufficiency of the evidence to sustain the court's finding that the murders were "especially heinous, cruel and depraved". The State did not cross-appeal the trial court's ruling on the "pecuniary gain" circumstance. Under Arizona law, A.R.S. Ann. Sect. 13-4032(4) (1978), the state may appeal an issue of law if the defendant appeals. In its brief, however, the State pointed to a recent decision of the Arizona Supreme Court, State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980), decided after Petitioner's trial, which had construed the "pecuniary gain"

Footnote 1. The trial court's errors in referring to the statutory sections in the special verdict are corrected in this brief.

aggravating circumstances and found it applicable to robbery murders. State's Answering Brief, p. 54, Joint App. p 17.

The Arizona Supreme Court reversed Petitioner's conviction for jury misconduct and expressly found the evidence had been insufficient to justify the trial court's finding that the murders were "especially heinous, cruel or depraved". The court also noted that the trial judge mistook the law on the pecuniary gain issue, referring to State v. Clark, supra. State v. Poland, 132 Ariz. 269, 285-286, 698 P.2d 784, 800-801 (1982).

After his retrial, Petitioner was resentenced to death. The trial judge found three factors in aggravation: (1) the offense was committed for pecuniary gain; (2) the murders were especially cruel, heinous or depraved; and (3) Petitioner had been previously convicted of a felony involving a threat of force or violence. (Petitioner had been convicted of robbery after the first trial). Special Verdict, February 3, 1983, Joint App. p 70.

Petitioner again appealed to the Arizona Supreme Court which affirmed both the conviction and the sentence. The State Supreme Court rejected Petitioner's double jeopardy challenge to his death sentence but again found the evidence insufficient to prove the killings were especially heinous, cruel and depraved. State v. Poland, 144 Ariz. 388, 698 P.2d 183, 198-200 (1985).

ARGUMENT

1. PETITIONER'S SECOND DEATH PENALTY TRIAL AFTER THE REVIEWING COURT FOUND THE EVIDENCE INSUFFICIENT TO SUPPORT HIS FIRST DEATH SENTENCE VIOLATED THE DOUBLE JEOPARDY PROVISIONS OF THE FIFTH AMENDMENT.

The Double Jeopardy Clause of the Fifth Amendment provides: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . ." This clause prohibits the retrial of a defendant who has once been acquitted of a crime charged. United States v. Ball, 163 U.S. 662, 669.

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. United States, 355 U.S. 184 (1957).

Historically, this Court has resisted extending double jeopardy protections to sentencing decisions. Stroud v. United States, 251 U.S. 15 (1919); North Carolina v. Pearce, 395 U.S. 711 (1969). The latter case reaffirmed the rule that double jeopardy did not bar retrial when a conviction was reversed, nor did it prohibit a greater sentence after retrial. Subsequently, this Court ruled on an important exception to the Pearce rule, i.e., a defendant may not be retried if his conviction is reversed on the ground that the evidence was insufficient to convict him of the crime charged. Burks v. United States, 437 U.S. 1 (1978).

Double jeopardy protection does attach to death sentencing proceedings which have the hallmarks of a trial. Bullington v. Missouri, 451 U.S. 430 (1981); Rumsey v. Arizona, _____ U.S. ____, 104 S.Ct. 2305 81 L.Ed.2d 164 (1984). The Court held in Bullington that Missouri's bifurcated system for imposing

the death penalty was the equivalent of a trial for Fifth Amendment double jeopardy purposes. Bullington could not constitutionally be sentenced to death at his retrial after having received a life sentence at his first trial. And this Court held in Rumsey that Arizona's death penalty sentencing procedure, was "indistinguishable for double jeopardy purposes from the proceeding in Missouri", 81 L.Ed.2d at 170-172. Both the Arizona and Missouri death penalty statutes provide: (1) the state must prove aggravating factors beyond a reasonable doubt; (2) admission of aggravation evidence is subject to the law of evidence; (3) the sentencing authority's discretion is limited to two choices: death or life imprisonment; (4) specific statutory standards must be met before a death sentence can be imposed, and (5) written findings of the reasons for the sentencing must be made. Bullington, 451 U.S. at 438-440, Rumsey, 81 L.Ed. 2d at _____. Because Poland's first death sentence was reversed for insufficient evidence, he was finally acquitted of a death penalty under Burks, Rumsey, and Bullington.

In State v. Poland, (Poland I) 645 P.2d 239 (1982), the Arizona Supreme Court found two legal errors in Petitioner's first sentencing. First, the sole aggravating circumstance found by the sentencing judge that the offenses were "especially cruel, heinous and depraved", was based on insufficient evidence. Second, the finding that the murders had not been committed for pecuniary gain was a legal error. The trial judge believed that aggravation circumstance covered only murders for hire. The second finding was never appealed from by the State. However, the Arizona Supreme Court found error in both of these rulings:

> "We do not believe that the evidence so far produced in this case shows that the murders were cruel. . . . There was no evidence of suffering by the guards . . . Cruelty has not been shown beyond a reasonable doubt . . .

> Neither does the evidence support a finding that the murders were heinous or depraved. . . . The issue focuses on the state of mind of the killer . . . The difficulty in making this determination in the case at bar is that there is very little evidence in the record of the exact circumstances of the guard's deaths. . . . We do not believe it has been beyond a reasonable doubt that the murders were committed in an 'especially heinous, cruel or depraved manner'.
>
> We do note, however, that the trial court mistook the law when it did not find that the defendants 'committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.' . . . It was not until after the trial in this case that we held in State v. Clark, supra, that A.R.S. Section 13-454(E)(5) was not limited to 'murder for hire' situations, but may be found where any expectation of financial gain was a cause of the murder. Upon retrial, if the defendants are again convicted of first degree murder, the court may find the existence of this aggravating circumstance." State v. Poland, 132 Ariz 269, 286, 645 P.2d at 800-801.

The issue before this Court is simply whether jeopardy attached to petitioner's first death penalty trial when the Arizona Supreme Court struck the only aggravating circumstance found by the sentencing judge. At that point, had it not been for the reversal of the conviction itself, the Arizona Supreme Court would have reduced the death sentence to life imprisonment without possibility of parole for 25 years. See e.g., State v. Madsen, 125 Ariz. 246, 353, 609 P.2d 1046, 1053 (1980); State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 637 (1979).

After petitioner was retried, found guilty, and again sentenced to death, the Arizona Supreme Court in Poland II upheld Petitioner's second death sentence rejecting Petitioner's double jeopardy argument:

> "Our holding in Poland I, however, was simply that the death penalty could not be based solely upon 'the cruel, heinous and depraved' . . . aggravating circumstance because there was insufficient evidence to support it. This holding was not tantamount to a death penalty 'acquittal'." State v. Poland, 144 Ariz. at _____, 698 P.2d at 199.

In Burks v. United States, 437 U.S. 1, 98 S.Ct., 2141, 57 L.Ed.2d 344 (1977), this Court held that if a conviction is reversed for insufficiency of evidence, the Double Jeopardy Clause precludes a new trial. In Bullington, supra, this Court, in its decision extending double jeopardy protections to death penalty sentencings, specifically cited, quoted at length, approved and reaffirmed Burks. After analyzing Burks the court stated:

> "Thus, the 'clean slate' rationale recognized in (North Carolina v. Pearce) is inapplicable whenever a jury agrees or an appellate court decides that the prosectuion has not proved its case." 451 U.S. at 443, 68 L.Ed.2d at 282.

The Poland II opinion implicitly holds that Burks does not apply to death sentencing trials. Other jurisdictions have found Burks applicable to trial-like sentencing proceedings. Carter v. State, 676 S.W.2d 353 (Tx.Cr.App. 1984); Ex Parte Charles Bullard, 679 S.W.2d 12 (Tx.Cr.App. 1984); French v. Estelle, 692 F.2d 1015, 1023-1024 (5th Cir. 1982); State v. Hamilton, 356 N.W.2d 169, 173 (Wis. 1984).

In the Fifth Circuit held that where the evidence was insufficient to establish an Enmund finding of an intent to kill at the close of the defendant's first trial, he could not be sentenced to death at his second trial. The court stated:

> "Burks interacts with Bullington; if the jury under Bullington or an appellate court under Burks finds the prosecution's evidence in support of the death penalty insufficient, the defendant cannot again be made to face a possible death sentence." Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984).

To the same effect is Young v. Kemp, 760 F.2d 1097 (1985), and Godfrey v. Francis, 613 F.Supp. 747, 753-755 (D.Ct. Ga. 1985). The Eleventh Circuit held in Kemp that a federal district court's habeas finding that evidence was legally insufficient to support two circumstances in aggravation precluded the state from

. . . .

attempting to impose the death penalty in the defendant's retrial. The court stated:

> "Young's situation is different from the precise situation present in Bullington, because the insufficiency finding here was originally rendered by a reviewing court, not by the sentencing jury as was the case in Bullington. However we need only look to Burks to understand that the finding of the federal district court in Young's case that the evidence was insufficient to support the death sentence also invokes double jeopardy principals. To deny Young access to the constitutional right established in Bullington 'would create a purely arbitrary distinction between those in ('Young's') position and others who ('like Bullington') enjoyed the benefit of a correct decision by the ('trial court'). Burks v. United States, 437 U.S. at 11, 98 S.Ct. at 2147. The pricipal of Burks leads us inexorably to the conclusion that Bullington, is fully applicable to the facts of this case. Accord, Jones v. Thigpen, 741 F.2d 805, 815 (5th Cir. 1984)."

The Poland I finding of evidentiary insufficiency for the sole aggravating factor cannot be considered dicta. A defendant has the right to raise the sufficiency of evidence issue and to have it decided on appeal regardless of whether there is some other reason to grant a new trial. United States v. Bibbero, 749 F.2d 581, 586 (9th Cir. 1984). This Court has noted that consideration of evidentiary sufficiency before ordering retrial is part of a state appellate court's "obligation to enforce applicable state and federal laws". Tibbs v. Florida, 457 U.S. 31, 72 L.Ed.2d 652, 653 (1982). Justices Brennan and Marshal, concurring, in Justices of Boston Municipal Court v. Lydon, ____ U.S. ____, 104 S.Ct. 1805, 1820-1821, 80 L.Ed.2d 311, 333 (1984) stated:

> "When a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the court may not consistent with the rule of Burks . . . ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial. Because the first trial has ended, 'retrial is foreclosed' by the Double Jeopardy

> clause if the evidence 'is insufficient' . . . hence the sufficiency issue cannot be avoided."

Thus, the finding that the evidence was insufficient to support the sole aggravating factor found by the trial court in Poland I precluded a subsequent death sentence for the same crime.

The second legal error according to Poland I was the finding that the murders had not been committed for pecuniary gain. In view of the lack of a cross-appeal by the State and subsequent decisions of this Court, Petitioner's double jeopardy protection is unaffected. In Rumsey v. Arizona, ____ U.S. ____, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), a majority of this Court affirmed an Arizona Supreme Court holding that the Double Jeopardy Clause prohibited sentencing a defendant to death on remand after finding a death penalty acquittal had been based upon legal error. At Rumsey's trial, the judge had misconstrued the same pecuniary gain statute in the same manner as did the trial judge in Petitioner's first trial. This Court held that: (1) Arizona's capital sentencing proceedings cannot be distinguished from those in Missouri for double jeopardy purposes; (2) an Arizona death sentence is a judgment like the sentence in Bullington, supra, which triggers double jeopardy protections; and (3) Rumsey could not be sentenced to death after having been acquitted of a death sentence even if the acquittal was based on legal error. 81 L.Ed.2d at 170-172.

Judge Rosenblatt made precisely the same error in Petitioner's first trial as the trial judge had made in Rumsey. Additionally, he made a second error in finding that the murders were "especially cruel, heinous and depraved". If he had not made the second error, Petitioner would have been in the same situation as Rumsey, i.e., his acquittal based on legal error would have barred a subsequent death sentence. Thus, the only

distinction between Petitioner and Rumsey is that at Petitioner's death sentencing trial, the judge made a second legal error and sentenced him to death. Surely the second legal error did not "cure" the first and prevent jeopardy from attaching.

Petitioner anticipates the State's argument that the Poland I ruling on the aggravating circumstance of pecuniary gain defeats Poland's sufficiency of evidence argument because the evidence was sufficient on at least one aggravating circumstance. This argument not only ignores the principle of Rumsey, supra, but would allow reviewing courts to serve as "super trial courts", addressing and deciding issues not properly before them. It is not the function of a reviewing court to say the evidence is insufficient on the crimes charged, but that on retrial the defendant can be retried for a lesser included offense, or for an attempt to commit the crime for which he was originally charged and acquitted. As the Arizona Supreme Court stated in State v. Rumsey, 665 P.2d 48, 55 (1983):

> "While we have an independent duty of review, we perform it as an appellate court, not as a trial court. We have never held that if the trial court finds sufficient mitigating circumstances we have independent power to reject its factual and legal conclusions and impose the death penalty."

The Polands did not waive their "right to an acquittal" on the death penalty by seeking a new trial. Burks, supra, 437 U.S. at 17, 57 L.Ed.2d at 13. However, the Court would not have remanded the case back to the trial court for an error which the State had not appealed. In Arizona, a sentencing error which is not appealed by the State is waived. State v. Tyree, 109 Ariz. 258, 260, 508 P.2d 335, 336 (1973).

By failing to file and serve its notice of cross-appeal pursuant to A.R.S. Ann. Section 13-4032(4), the State waived the "pecuniary gain" issue and prevented the Arizona Supreme Court

from acquiring jurisdiction over that issue. State v. Berry, 133 Ariz. 264, 266, 650 P.2d 1246, 1248 (App. 1982); State v. Good, 9 Ariz. App. 388, 391, 452 P.2d 715, 718 (1969). The issue was not even open for review by the Arizona Supreme Court.

CONCLUSION

From Bullington until Poland II no reviewing court had suggested that defendants at sentencing trials are somehow entitled to less double jeopardy protection than at guilt trials. This Court and the other federal and state courts who have addressed this issue have held the full panoply of double jeopardy protections applicable to trial-like death penalty sentencings. All of the policies and concerns of the Double Jeopardy Clause indicate that Burks is fully applicable to Petitioner's death sentence. Petitioner requests the Court to reverse his death sentence.

RESPECTFULLY SUBMITTED
this 7th day of November,
1985.

By Marc E. Hammond

MARC E. HAMMOND
P. O. Box 2720
Prescott, Arizona 86302
Counsel for Petitioner
Patrick Gene Poland

MAILING CERTIFICATE

COPY of the foregoing Petitioner's Brief on the Merits mailed this 7th day of November, 1985, postage prepaid to:

ROBERT K. CORBIN
Attorney General of the
State of Arizona
WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division
1275 W. Washington First Floor
Phoenix, Arizona 85007

H. K. WILHELMSEN
P. O. Box 2321
Prescott, Arizona 86302
Attorney for Petitioner
Michael Kent Poland

GERALD R. GRANT
Assistant attorney General
Department of Law
1275 W. Washington First Floor
Phoenix, Arizona 85007